UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

LAWRENCE E. JAFFE PENSION PLAN, On Behalf of Itself and All Others Similarly Situated, Plaintiff, vs. HOUSEHOLD INTERNATIONAL, INC., et al., Defendants.	Lead Case No. 02-C-5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman Magistrate Judge Nan R. Nolan

THE CLASS' STATUS REPORT FOR THE APRIL 27, 2007 STATUS CONFERENCE

The Class hereby identifies the issues that it wishes the Court to address at the April 27, 2007 status conference.

1. Deposition and Scheduling Issues

The depositions of John Keller and Chris Bianucci, witnesses for Arthur Andersen LLP ("Andersen") and Ernst & Young ("E&Y"), were previously scheduled for April 26 and April 27. On April 13, 2007 counsel for the witnesses canceled the depositions and informed the Class that she would not make these witnesses available until all of the issues surrounding the E&Y work papers are resolved. E&Y also has refused to produce any of the documents in its possession without Household International, Inc.'s ("Household" or the "Company") approval.

As the Court is aware, the Class still needs to depose Messers. Keller and Bianucci about their work at Andersen – Household's auditor during much of the Class Period – prior to submission of the Class' expert reports. Due to the delay in scheduling these depositions, the Class proposes the following modified expert discovery schedule:

- Plaintiffs to disclose experts and reports by June 8, 2007;
- Defendants to disclose experts and reports by August 10, 2007;
- Plaintiffs to disclose rebuttal reports by September 10, 2007;
- Expert discovery and depositions to conclude by October 22, 2007.

In order to make this schedule work the Class must complete its depositions regarding the work performed by Messers. Keller and Bianucci for Andersen by May 15, 2007. The Class does not want to postpone these depositions any further. Accordingly, the Class wishes to proceed with the depositions both on Andersen as well as E&Y topics as soon as possible. A firm date for these depositions also will encourage E&Y to comply with their own document production obligations, which has still not occurred.

To prevent yet further delay and to ensure that E&Y is present at the status conference to explain its position, the Class has filed a motion to compel E&Y to produce its documents by May 7, 2007 and witnesses by May 15, 2007. *See* Dkt. No. 1051.

2. Ernst & Young Work Papers

At the April 12, 2007 telephonic status conference, defendants were ordered to produce (1) the index of E&Y "sampling" work papers, and (2) a declaration from E&Y detailing the work performed by E&Y and describing the work papers defendants seek to withhold. Defendants produced the index on April 23, 2007. The index does not support defendants' claim of attorney-client privilege. The Class notes, moreover, that the index clearly does not contain privileged information, and defendants could not have had a good faith basis for withholding the index in the first place.

After the close of business today, the Class received a redacted copy of the E&Y affidavit defendants submitted *in camera* to the Court yesterday. *See* Exs. A-B (all exhibits are attached hereto). By seeking an extension to file the affidavit and then failing to serve the affidavit on the Class until tonight, defendants have successfully prevented the Class from analyzing the document and providing a written response in advance of the status conference. Ex. B.

Furthermore, although the Court instructed defendants to provide the Class with a redacted version of the affidavit today, the Class maintains its position that, absent disclosure of the entire affidavit, defendants should not be permitted to rely on the affidavit in attempting to meet their burden of establishing privilege. It strains credulity for defendants to assert that they cannot provide the information requested by the Court, including an overview of the work papers and an explanation of when E&Y received and/or prepared each document, without revealing privileged information. As the Court correctly recognized in requiring the affidavit in the first place, the affidavit is necessary, in part, to establish a record of defendants' claimed basis for the privilege. An *in camera*

submission, partial or otherwise, does not achieve this goal. Importantly, without complete disclosure of defendants' purported basis for the privilege, the Class will be unfairly handicapped in testing the credibility of defendants' assertions. Accordingly, the Class reiterates its request that the Court either order defendants to produce the entire affidavit or strike the affidavit and enter a finding that defendants have failed to properly justify their assertion of privilege.

The Class summarizes below its current position regarding the E&Y work papers:

Pursuant to the Court's prior orders, defendants can only withhold E&Y work papers based on the attorney-client privilege. Establishing that the work papers constitute attorney work product is not enough because the Class has demonstrated substantial need for the documents so as to overcome the privilege. February 27, 2007 Order at 2. In fact, the Court has ordered that documents subject only to work product protection "must be produced." *Id.* Although defendants' log may have established a *prime facie* case for attorney work product, as discussed below, defendants have not met their burden of establishing that the E&Y work papers are protected by the attorney-client privilege.

Defendants' blanket claim of attorney-client privilege over all E&Y work papers fails for four fundamental reasons: (1) defendants have failed to identify any attorney-client communications, an essential element of the privilege; (2) defendants' stated basis for asserting the attorney client privilege – the "general nature of the engagement" – is not sufficient to establish the privilege; (3) defendants have not established that E&Y's post-Class Period work was done to assist in the provision of legal advice; and (4) defendants have not established the steps taken to preserve the confidential nature of the documents. The Class addresses each of these deficiencies, as well as defendants' failure to produce documents created prior to the end of the Class Period, in turn below.

Defendants' Log Does Not Identify a Single Communication. A critical element of the attorney-client privilege is the element of a communication between an attorney and a client. If there

is no communication, there is no attorney-client privilege. Indeed, the Court held on February 27, 2007 that "any ***communications*** between E&Y and Household dated after [August 16, 2002] are not subject to the *Garner* exception and remain privileged" but that documents "covered only by the work product privilege" still "must be produced." February 27, 2007 Order at 2 (emphasis added). Thus, in order to establish attorney-client privilege as to a particular work paper, defendants must point to (1) a confidential attorney-client communication[1] that (2) took place after August 16, 2002. Defendants have done neither.

Defendants' log does not identify any documents reflecting a communication between attorney and client after the Class Period. In fact, the log does not reflect ***any*** communication. The vast majority of documents identified on defendants' log are internal analyses performed by E&Y and documents relied on by E&Y in performing these analyses. The first entry on the first log which describes the documents withheld as "Analysis of Alaska prepayment penalties and supporting documents," is typical of the privilege log entries, many of which identify an analysis performed by E&Y of one of Household's improper lending practices and documents supporting that analysis. Such documents are, at best, work product, *i.e.*, documents created by attorneys or their agents (in this case E&Y). Pursuant to the Court's prior orders the Class has demonstrated good cause to overcome the work product privilege and all such documents should be produced. February 27, 2007 Order at 2.

Additionally, defendants' log confirms that the work papers they seek to withhold are internal E&Y documents, not communications between E&Y and Household. Defendants' three

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[1] It should be noted that for purpose of the compliance engagement, the Court has found that Household's general counsel was the attorney, E&Y was an agent of Household's general counsel and Household was the client. Accordingly, communications between E&Y and the office of Household's general counsel do not constitute attorney-client communications as they are nothing more than communications between an attorney and his agent.

privilege logs list more than 1,450 documents, but do not contain a single "recipient." That holds true even for the final consumer lending compliance report recently provided to the Court. *See* Third Installment of Household Defendants' Privilege Log Regarding Work Papers from Ernst & Young Compliance Engagement, Entry No. 265. Thus, the log acknowledges that the work papers do not represent any communication, let alone the required confidential communication between attorney and client for the purpose of rendering legal advice. *See United States v. South Chicago Bank*, No. 97 CR 849-1, 1998 U.S. Dist. LEXIS 17445, at *6 (N.D. Ill. Oct. 30, 1998) (finding no attorney-client privilege as to the accountants' work papers because they did not reflect any communication between an attorney and a client); *see also In re Grand Jury Subpoena*, 731 F.2d 1032, 1038 (2nd Cir. 1984) (internal document from outside counsel not privileged as it did not reflect communications or reveal legal advice).

In addition to its failure to identify a single recipient, the log also fails to indicate the date on which any purported communication was made (as opposed to the date the documents were created). This failure further supports the conclusion that the disputed documents do not reflect attorney-client communications. Additionally, more than 40 entries on the log list "N/A" as the date of creation and thus do not even identify the date the document was created. As defendants cannot demonstrate that these documents were created after August 16, 2002 (let alone that they are post-Class Period communications), they should be produced immediately.

Similarly, the "sampling" documents withheld by defendants but not logged are not attorney-client communications. According to defendants, these documents reflect data sampling and data validation done with respect to a database provided by defendants to E&Y. Defendants have refused to include these documents on a log and thus identify who sent or received each document. The recently produced index describing these documents does not support defendants' claim of attorney-client privilege. Having failed to identify any confidential communication, on a log or otherwise,

defendants cannot prevail on their assertion of attorney-client privilege with respect to these documents.

Defendants Cannot Rely on the "General Nature of the Engagement" to Establish Attorney-Client Privilege. Defendants contend that the E&Y work papers are nevertheless subject to the attorney-client privilege due the "general nature of the engagement." It is unclear whether defendants contend that disclosure of the disputed documents will reveal the general nature of the engagement which is privileged or that due to the general nature of the engagement, all documents created by E&Y are subject to the attorney-client privilege. Both theories fail. With respect to the former, the "general nature of the engagement" is known to the Class and does not provide a basis for asserting privilege. This Court already has held that due to the fiduciary relationship between the Class and Household at the time of the engagement, defendants are to produce to the Class all documents relating to communications with E&Y that took place during the Class Period. The Class already has the engagement letter between Household and E&Y and thus has full and complete knowledge of the general nature of the engagement. Production of the E&Y work papers created in furtherance of the engagement will not reveal or reflect the contents of any communication the Class is not already entitled to know about due to their fiduciary relationship. As there is no confidential communication to protect with respect to the Class, the "general nature of the engagement" does not suffice to establish the attorney-client privilege.

With respect to the latter theory, the general nature of the engagement may be enough to establish that work performed by E&Y is work product, but again, absent a particular communication, it is not enough to establish the attorney-client privilege. This Court confirmed as much when it acknowledged in the February 27, 2007 Order that certain of the E&Y work papers may be "covered only by the work product privilege" and therefore "must be produced." February 27, 2007 Order at 2.

Defendants Have Not Established the Nature of the Legal Advice Sought After the Class Period. Defendants rely solely on the Court's December 6, 2006 Order as the basis for their assertion of attorney-client privilege. *See generally* Household Defendants' Privilege Log Regarding Work Papers from Ernst & Young Compliance Engagement. In that order, the Court found that the work performed by E&Y was necessary to "assist in-house counsel in providing legal advice regarding pending or anticipated litigation." December 6, 2006 Order at 8. The Court has stated several times, however, that in making this finding it was unaware the E&Y engagement continued after the end of the Class Period. *See, e.g.*, February 27, 2007 Order at 1. This fact is important because the "pending or anticipated litigation" cited by defendants and relied on by the Court was resolved by the end of the Class Period.

In support of its privilege finding, the Court relied on defendants' assertion that E&Y was retained in response to a lawsuit filed by the State of California and that "Household was concerned about the possibility of similar claims in other states." December 6, 2006 Order at 1. The Court also relied on the fact that "at the time Household retained E&Y, it was preparing for a negotiation with the Multistate Working Group regarding threatened claims arising from the Company's consumer lending practices." *Id.* at 8. By the end of the Class Period, however, Household had entered into a settlement with the Multistate Working Group. Every state in which Household did business joined in this settlement which extinguished any threat of state claims arising from the Company's consumer lending practices during the Class Period. Accordingly, the reasons cited by defendants, and relied on by the Court in the December 6, 2006 Order, do not apply to work done by E&Y after the end of the Class Period.

Thus, because the legal issues faced by Household were resolved before the documents at issue were created, the Court should require Household to identify on the log (1) the reasons why E&Y continued its engagement after resolution, and (2) the specific legal advice for which each

particular post-Class Period work papers was necessary. Without this information, defendants cannot establish that the post-Class Period documents are privileged.

Defendants Have Not Demonstrated the Steps Taken to Preserve the Confidentiality of the Disputed Documents. Another element of the privilege that defendants are required to prove is the steps taken to preserve the confidential nature of the documents. This element is particularly important here because, according to defendants, these documents were lost in a warehouse for more than two years. Defendants' failure to provide a declaration or affidavit with respect to the steps taken to preserve the confidentiality of these work papers is yet another reason their assertion of privilege fails.

Documents Created Prior to the End of the Class Period. As the Court is aware, defendants have withheld numerous E&Y work papers dated within the Class Period. Defendants claim that these documents were withheld because their agreement to produce all documents created during the Class Period extended only to the documents at issue in the original motion. Defendants' explanation of their recently changed position is not well taken. First, the Class' original motion sought all documents related to the compliance engagement. In addition to agreeing to produce all such documents in their own possession that were created during the Class Period, on February 12, 2007 defendants granted E&Y express permission to produce to the Class "all documents concerning [the compliance] engagement that was received, reviewed, created or revised during the class period (*i.e.*, between July 30, 1999 and October 11, 2002)." Ex. C. Thus, defendants already have agreed to produce their own documents through the end of the Class Period and expressly granted E&Y permission to do the same. Defendants should not be permitted to change their position simply because the documents they now seek to withhold may be damaging. Defendants should be ordered to immediately produce all E&Y work papers created prior to the end of the Class Period.

3. PricewaterhouseCoopers and Jefferson Wells

During the Class Period, in response to state agency examinations, defendants hired PricewaterhouseCoopers ("PwC") and Jefferson Wells International, Inc. ("Jefferson Wells") to assess its predatory lending practices and assess refunds. On March 30, 2007, the Court ordered defendants to state whether they had in their possession documents related to these engagements. At the time, the Court noted that defendants have a continuing obligation to produce responsive documents. At the April 12, 2007 status conference, defendants argued that they had no obligation to answer this simple question, claiming that such documents would not be responsive to any request propounded by the Class. The Court ordered the parties to meet and confer, which they did on April 16, 2007. During the meet and confer, counsel for defendants refused to confirm complete production, or to confer with their client regarding their production.

For example, the Class identified the following document request to which the PwC and Jefferson Wells work papers would be responsive:

> "Documents that track, analyze or describe refunds related to state regulatory examinations and investigations, including, but not limited to, refunds for, prepayment penalties, origination fees, single premium credit life insurance, discount points, EZ Pay, finance charge, recording fees, and administration fees."

See Plaintiffs' Third Request for Production of Documents to Household Defendants, Request No. 34. In their original response to this request, defendants had agreed to produce "non-privileged, responsive documents relating to the Consumer Lending business unit. . . ." *See* Household Defendants' Objections and Responses to Plaintiffs' Third Request for Production of Documents.

The PwC and Jefferson Wells compliance studies were analyses of Household's refunds which were done in response to state agency investigations into Household's lending practices. They are clearly responsive to this request and the scope of defendants' response; however, during the meet and confer, defendants confirmed that in producing documents responsive to this request they did not look for PwC and Jefferson Wells work papers. The Class proposed that defendants go

back to determine whether Household has documents within the scope of this request that were generated or produced by PwC or Jefferson Wells. Defendants refused to make this inquiry on the grounds that it would "broaden" the document request despite their agreement long ago to produce documents responsive to this request.

At bottom, defendants have no reasonable basis for refusing to respond to the simple question: Does Household have in its possession work papers from the PwC and Jefferson Wells audits that relate to defendants calculations or analyses of defendants' lending practices which have not been logged or produced? The Court should require defendants to provide an unequivocal answer (*i.e.*, "yes" or "no") to this simple question so that the parties may put this issue to bed.

DATED: April 25, 2007

Respectfully submitted,

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DECLARATION OF SERVICE BY EMAIL AND BY U.S. MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and employed in the City and County of San Francisco, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 100 Pine Street, Suite 2600, San Francisco, California 94111.

2. That on April 25, 2007 declarant served by electronic mail and by U.S. Mail to the parties the: **THE CLASS' STATUS REPORT FOR THE APRIL 27, 2007 STATUS CONFERENCE**. The parties' email addresses are as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed this 25th day of April, 2007, at San Francisco, California.

s/ Pamela Jackson
PAMELA JACKSON